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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

ART UNIT: 3732

EXAMINER: Matthew M. Nelson

APPLICANT: James K. Garland

SERIAL NO.: 10/589,386

FILED: 06-07-2007

FOR: DENTAL MODEL TRAY AND
ASSOCIATED ARTICULATOR

DOCKET NO.: Tear Away Wall

**PETITION TO
THE DIRECTOR**

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

In accord with 35 CFR 1.183, Applicant respectfully petitions the Director to suspend or waive the rule under which the above-identified application has been declared by the Examiner to have gone abandoned. The Director is respectfully asked to restore this application to its correct status as being on appeal, and to further enter a correction to page 1 of Applicant's Amended Appeal Brief. The correction is made on page 1 of the previously filed Applicant's Amended Appeal Brief, and the corrected page 1 is enclosed with this Petition. The corrected page 1 enclosed herewith should be substituted for page 1 of the Applicant's Amended Appeal Brief.

In accord with 35 CFR 1.183, the Director may suspend or waive any action when justice requires. It is respectfully submitted that if there is or was any situation when justice requires the corrective action of the Director, the present case qualifies at the top of the list. If the holding of abandonment in the present case is not withdrawn, a great injustice will be incurred by Applicant, and that injustice will be the result of a mistake made by the Applicant's undersigned attorney

and the application of a very harsh rule that has nothing to do with the merits of the case. Such an injustice should not be allowed to happen.

Applicant filed an Appeal Brief on July 23, 2009. In that Appeal Brief it was stated that "Claims 1-8 are included in this proceedings." That statement was made under the heading "Status of Claims." On Oct. 19, 2009, the Examiner issued a "Notification of Non-Compliant Appeal Brief" in which it the brief was objected to because it "does not contain the status of claims on appeal" along with objections to the summary of claimed subject matter and lack of headings. Applicant filed an Applicant's Amended Appeal Brief on Oct. 26, 2009 in a good faith effort to correct all the objections set forth in the "Notification of Non-Compliant Appeal Brief." Under the heading "Status of Claims" in Applicant's Amended Appeal Brief it was stated, "Claims 1-8 stand rejected." Unfortunately, Applicant's undersigned attorney failed to include the previous statement that "Claims 1-8 are included in this proceedings" which had been made under the same heading "Status of Claims" in the Appeal Brief as originally filed. That statement that "Claims 1-8 are included in this proceedings" was inadvertently and mistakenly removed from Applicant's Amended Appeal Brief.

On Jan. 19, 2010, the Examiner issued a "Notice of Abandonment" in which it is very incorrectly stated that, "The communication filed on 10/19/09 did not correct the status of the claims." Now, it is respectfully pointed out that the communication dated 10/19/09 was in fact the Examiner's own "Notification of Non-Compliant Appeal Brief." Applicant's Amended Appeal Brief was filed on Oct. 26, 2009 and certainly not on 10/19/09. The Examiner makes a blaring error. The communication dated 10/19/09 could absolutely not have corrected anything inasmuch as that communication was in fact from the Examiner and not from Applicant. Based on the flawed allegation that the communication of 10/19/09 did not correct the status of the claims, the Examiner cites MPEP 12051.03 and holds that the claims remain uncorrected, that the appeal is dismissed and that the application goes abandoned.

Now, it is acknowledged that Applicant's Amended Appeal Brief filed on Oct. 26, 2009 did not contain the magic words that "claims 1-8 are appealed." That was clearly a clerical error on the part of Applicant's undersigned attorney. Evidently, at least theoretically, the Examiner could have held that the application goes abandoned because of that clerical error made by

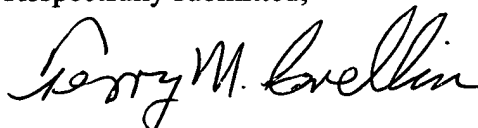
Applicant's undersigned attorney. But, the Examiner did not do that. The Examiner said the application goes abandoned because the Examiner's own communication dated 10/19/09 did not correct the status of the claims. The Examiner made a clerical error and based what may have been a valid conclusion on a very invalid hypothesis.

Now, the point is that even the Examiner would likely agree that it would undoubtedly be unjust to hold that because the Examiner has made a clerical error and has as a result failed to properly prepare and file an Examiner's Answer, that the appeal be dropped by the Patent Office and a notice of allowance of all claims be forthwith issued. It is just as manifestly unjust for the Examiner to use the nuclear option to declare the application as being abandoned because of a clerical mistake made by the Applicant. It is beyond all reasonable doubt plainly and manifestly unjustified to use a technicality as a nuclear option to decide that the appeal is dismissed, not on its merits, but on a clerical error made by Applicant's undersigned attorney. If there is any case in which justice requires that the Director step in and direct justice to be done, this is it. Justice requires that the Director suspends the rule upon which the Examiner has relied to declare the application as being abandoned. The Director should instruct the Examiner to restore this application to its correct status as being active on appeal, and to further to replace page 1 of Applicant's Amended Appeal Brief with the enclosed page 1 which has been corrected so as to add the magic words "claims 1-8 are on appeal" under the heading "Status of the Claims."

The appropriate petition fee of \$400.00 is also enclosed herewith.

DATED this 4th day of Feb., 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry M. Crellin". The signature is fluid and cursive, with the first name "Terry" being more prominent.

Terry M. Crellin
Attorney of Record for Inventor
Registration No. 25,579



APPLICANT'S AMENDED APPEAL BRIEF

Real Party in Interest

The real party in interest with respect to Appellant's appeal is the Applicant, James K. Garland.

Related Appeals and Interferences

There are no related appeals and interferences known to Applicant.

Status of Claims

Claims 1-8 stand rejected, and Claims 1-8 are on appeal, i.e., are appealed.

Status of Amendments

The claims were amended in response to the first Office Action, and that amendment has been entered. The claims were amended a second time in response to the Final Rejection, and the second amendment was not entered.

Summary of the Claimed Subject Matter

The numbers in the following summary are the reference numbers used in the drawings of the patent application. Subject matter of claim 1 includes dental trays 12 and associated articulation members 13 and 14 which are used in pairs. The two trays 12 are identical. Each tray 12 comprises a rigid bottom wall 16. A continuous side wall 17 extends upwardly from the perimeter of the bottom wall 16 to form an open-topped cavity which is adapted to receive the dental casting material. (Page 5, lines 12-21 and Figs. 1, 2 and 4) The trays 12 are formed integrally from a rigid polymeric material. The lower edge or perimeter of the side wall 17 is attached to the perimeter of the bottom wall 16 by a thin connector member 19 that is formed